



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Objection of the Parker Lake
Boating Enthusiasts to the Slow-No-Wake
Ordinance Number 1-99 for Parker Lake Enacted
by the Town of Jackson in Adams County,
Wisconsin

Case No.: IH-02-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 24, 2002, the Parker Lake Boating Enthusiasts filed with the Department of Natural Resources (Department) a request for a contested case hearing pursuant to Wis. Stat. § 30.77(3)(dm)2r objecting to a slow-no-wake ordinance for Parker Lake enacted by the Town of Jackson, Adams County. On May 14, 2002, the Department forwarded the request to the Division of Hearings and Appeals. The undersigned administrative law judge conducted prehearing conferences in this matter on May 28 and June 17, 2002. Pursuant to the agreement of the parties, no evidentiary hearing was scheduled and this matter is being decided on the basis of stipulated facts and written argument. The last brief was filed on July 2, 2002.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Parker Lake Boating Enthusiasts, by

Attorney William O'Connor
Wheeler, Van Sickle & Anderson, S.C.
25 West Main Street, Suite 801
Madison, WI 53703-3398

Town of Jackson, by

Attorney Paul S. Screnock
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333 North Main Street
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Wisconsin Department of Natural Resources, by

Attorney Michael A. Lutz
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FINDINGS OF FACT

1. The Town of Jackson (the Town) is located in Adams County. Parker Lake is located within the Town. Parker Lake is navigable in fact.

2. The Parker Lake Boating Enthusiasts (PLBE) is a non-stock corporation organized under Wis. Stat. Chapter 181. PLBE is a “boating organization” as that term is used in Wis. Stat. § 30.77(3)(dm)1.a.

Findings of fact three through nine were stipulated by the parties and were set forth in a letter dated June 18, 2002 drafted by the attorney for the Town:

3. As early as July 11, 1983 the Department of Natural Resources (Department) urged the Town to enact a slow-no-wake ordinance on Parker Lake. The Town Board also received a petition requesting it to adopt the slow-no-wake ordinance for Parker Lake.

4. On May 6, 1998, June 9, 1998, July 8, 1998, and December 9, 1998 the Town Board noticed, had on the agenda and discussed the Parker Lake slow-no-wake issue at town meetings. The Town Board listened to comments both in favor and against said ordinance. The Town Board enacted Ordinance No. 1-99, a slow-no-wake speed limit for Parker Lake, on January 6, 1999. Ordinance No. 1-99 was set to take effect after Department review and upon its publication.

5. The Town concedes there was no actual notice of a public hearing in which Wis. Stat. § 30.77(3)(aw) was published, mentioned or distributed other than the above-mentioned four town meetings.

6. The Town submitted Ordinance No. 1-99 to the Department for advisory review under Wis. Stat. § 30.77(3)(d) on March 1, 1999. The Town also sent the “Condition Report” to the Department at the same time.

7. The Department sent an advisory review letter to the Town dated April 13, 1999. The letter stated that “[u]pon review . . . [the Department] find[s] [the ordinance] to be consistent with §§ 30.50 to 30.71 of the Wisconsin Statutes and Department rules adopted to implement those sections.”

8. The Ordinance was published in the Friendship Reporter/Adams County Times on May 19, 1999.

9. There is nothing recorded in the minutes of the town meetings at which the proposed ordinance was discussed indicating whether the Town considered the factors set out in Wis. Stat. § 30.77(3)(cm).

10. Based on the stipulated facts the slow-no-wake ordinance for Parker Lake passed by the Town was not enacted in compliance with the procedure set forth in Wis. Stat. § 30.77(3).

DISCUSSION

The Town argues extensively in its brief that the slow-no-wake speed limit for Parker Lake is in the public interest. The material submitted by the Town along with its brief indicates that the Department urged it to enact a slow-no-wake speed limit for Parker Lake and that there was substantial citizen support for the passage of such an ordinance. However, the issue of whether the ordinance is in the public interest is not before the Division of Hearings and Appeals at this time. The only issue raised by PLBE is whether the ordinance was lawfully enacted.

The authority of town governments is limited. "[A] town has only such powers as are specifically delegated to it by the legislature." *Adamczyk v. Caledonia*, 52 Wis.2d 270, 273, 190 N.W.2d 137 (1971). The legislature has given towns authority to enact boating ordinances. The authority is found at Wis. Stat. § 30.77(3). However, because the authority for towns to enact boating ordinances is derived from the statute, it is necessary for a town to follow the procedure set forth in the statute in order for the ordinance to be valid. Wis. Stat. § 30.77(3)(aw)2. provides:

The town, village or city that has the most footage of shoreline of the lake within its boundaries and that is supporting the proposal [for a boating regulation] shall publish a notice of the public hearing under subd. 1. or par. (ae) or (am) 4. at least 30 days before the date of the hearing in one or more newspapers likely to give notice of the hearing in all towns, villages or cities that have jurisdiction over the lake. The notice shall be a class 1 notice under ch. 985. The town, village or city publishing the notice shall send a copy of the notice at least 30 days before the date of the hearing to the department, each municipality having jurisdiction over the lake and each lake association for the lake.

The Town concedes it did not publish notice of a public hearing on the ordinance. Additionally, although not conceded by the town, it appears no public hearing on the ordinance was held. The town argues that discussion of the proposed ordinance at four separate town meetings constitutes substantial compliance with the statutory procedure. However, with no published notice of any hearing on the ordinance, there is no evidence that persons interested in the ordinance were adequately notified of the discussions.¹ As evidenced by the PLBE's objection to the ordinance, a group of people does exist who oppose the ordinance and would

¹ In addition to publication, Wis. Stat. § 30.77(3)(aw)2. also requires that a copy of the notice of public hearing be sent to the Department and each lake association for the lake. Since no notice of a public hearing was generated, the Town obviously did not comply with this requirement either.

presumably have appeared at a public hearing to testify against enactment of the ordinance. The Town Board minutes indicating that the ordinance was discussed is not sufficient to show substantial compliance with the statutory procedure.

The PLBE also argues that the procedure the Town used to pass the ordinance was deficient because there is evidence that the Town Board considered the factors listed at Wis. Stat. § 30.77(3)(cm) when it passed the ordinance. It is impossible to determine from the minutes submitted by the Town which factors were actually considered by the Town Board. The Town stipulated that there is no reference in the minutes of the town meetings at which the proposed ordinance was discussed indicating whether the statutory factors were considered. In its brief, the Town alleges that the “pros and cons of the ordinance” were discussed during the four town meetings at which the proposed ordinance was considered. It is not possible to determine from the evidence in the record whether the Town Board considered any of the statutory factors. However, since it has been found that the Town failed to conduct a properly noticed public hearing prior to the enactment of the ordinance, it is not necessary to make a finding on this issue.

The subject ordinance has been in effect since 1999. The PLBE did not request a hearing on the ordinance until April 24, 2002. The Town argues that PLBE’s request for hearing should be dismissed due to laches on the part of PLBE. The slow-no-wake speed limit was in effect for three boating seasons before PLBE filed its request for a contested case hearing. The members of PLBE surely were aware of the ordinance and its delay in requesting a hearing may constitute laches. However, laches is an equitable remedy. As an administrative agency, the Division of Hearings and Appeals does not have equitable powers.

Finally, as mentioned above, the Town argued in its brief that a slow-no-wake speed limit on Parker Lake is in the public interest. This decision should not be construed as determining that the ordinance is not in the public interest. The finding is that the Town failed to follow the statutory procedure for enacting a boating regulation under Wis. Stat. § 30.77. The Town has the authority to enact a boating ordinance for Parker Lake. However, in doing so it must comply with the procedural requirements of Wis. Stat. § 30.77(3).

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders in review of ordinances promulgated under Wis. Stat. § 30.77(3) pursuant to Wis. Stat. §§ 30.77 and 227.43.

2. Any town, village or city may, in the interest of public health, safety or welfare, including the public’s interest in preserving the State’s natural resources, enact ordinances that are not inconsistent with Wis. Stat. Chapter 30, if the ordinances relate to the use or operation of boats. Wis. Stat. § 30.77(3)(a).

3. The authority of a town board to enact a boating ordinance is limited to the authority derived from Wis. Stat. § 30.77(3). A local boating ordinance not enacted in compliance with the procedures set forth in Wis. Stat. § 30.77(3) is not valid. Wis. Stat. § 30.77(3)(aw)2. requires that a town conduct a public hearing on a boating ordinance prior to the enactment of the ordinance and that notice of the public hearing be published. The Town of Jackson did not comply with this requirement. Because the Town of Jackson failed to follow the statutory procedure in enacting its slow-no-wake speed limit for Parker Lake, the ordinance is invalid.

ORDER

The Town of Jackson failed to comply with the statutory procedure in enacting ordinance No. 1-99, the Slow-No-Wake speed limit for Parker Lake. The ordinance is, therefore invalid.

Dated at Madison, Wisconsin on July 24, 2002.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

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NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.